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# In the Supreme Court of the United States

OCTOBER TERM, 1973

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RALPH GROUNDS, HENRY HUSER, ET AL.
(LANDOWNERS), PETITIONERS

*v.*

NORTHERN NATURAL GAS COMPANY, ET AL.

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*ON PETITION FOR REHEARING OF THE DENIAL OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

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ROBERT H. BORK
Solicitor General
Department of Justice
Washington, D.C. 20530

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No. 71-218

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION [1]

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The petition for rehearing raises the single issue whether the petition for a writ of certiorari was timely filed in this Court.

As we pointed out in our original memorandum (p. 10), the judgment of the court of appeals was entered

[1] This memorandum is filed at the request of the Court dated December 14, 1971.

on March 2, 1971. The government and certain other parties filed timely petitions for rehearing, which the court denied on May 20, 1971. Petitioners did not file timely petitions for rehearing in the court of appeals; while they filed a motion for leave to file such petitions out of time, the court below denied the motion as untimely. Their petition for a writ of certiorari was filed in this Court on August 12, 1971.

Petitioners "do not now rely on that motion [for leave to file out-of-time rehearing petitions in the court of appeals] to extend the time for filing [a] petition for certiorari" (Pet. for Rehearing 6). Rather, their claim is that the filing of timely petitions for rehearing in the court below by *other* parties suspended the finality of that court's judgment as to *all* parties, including petitioners, until the date the rehearing petitions were denied, and that measured from that date, their petition for a writ of certiorari was filed within the 90-day period prescribed by 28 U.S.C. 2101(c). We do not agree.

The petitions for rehearing filed in the court below by the other parties did not present any issue on behalf of petitioners or pertaining to that court's judgment against them. As to petitioners, therefore, the original judgment of the court would not have been altered or affected even if the court of appeals had granted the rehearing petitions and decided anew the matters raised therein.[2] Thus, by its original judg-

[2] Of course, it would have been possible for the court *sua sponte* to reconsider and decide issues pertaining to petitioners, but that would be true regardless of whether any

ment the court below "completely determine[d] the rights * * * of some of the parties [petitioners here] * * *, and a final decision which completely determines a collateral matter distinct from the general subject of litigation, and finally settles that controversy, is subject to review" at that time, without awaiting a final decision as to other parties on other issues. *Republic of China* v. *American Express Co.*, 190 F. 2d 334, 336 (C.A. 2).

In this circumstance, we submit that the original judgment of the court of appeals controls with respect to review of that court's decision pertaining to petitioners. We believe that petitioners could have sought review of that judgment against them as soon as it was entered, on March 2, 1971. Compare *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206.[3] Therefore, the 90-day period for filing a

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petition for rehearing was pending before it. See *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542. In the present case, however, the court below simply denied the petitions for rehearing.

[3] The general rule that "a judgment is not final until it is final as to all parties and as to all issues" (Pet. for Rehearing 4) is not applicable here. Cases like this one, where the criteria set forth in *Republic of China* are satisfied, are an exception to the general rule. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, on which petitioners rely (Pet. for Rehearing 5), is distinguishable, since that was a direct appeal from a district court decision and the post-decisional motions there were made by parties adverse to the party which did not file timely motions (the government) and raised issues pertaining to and directly involving the government. The latter circumstance also distinguishes *United States* v. *Adams*, 383 U.S. 39, which petitioners cited in their Reply Brief (pp. 4-5).

petition for a writ of certiorari prescribed by 28 U.S.C. 2101(c) began on the date of that judgment (March 2, 1971) and expired on May 31, 1971. The petition was not filed, however, until August 12, 1971, and no extension of time was sought or granted. Since the statutory time limitation is jurisdictional, this Court correctly denied the petition as untimely. See *Federal Trade Commission* v. *Minneapolis-Honeywell Co., supra.*

The rule stated in the *Republic of China* case has been modified for district court cases by Rule 4(a) of the Federal Rules of Appellate Procedure, which provides that upon the timely filing of certain post-decisional motions in the district court *by any party*, "[t]he running of the time for filing a notice of appeal is terminated *as to all parties* * * *" (emphasis supplied). There is no such rule, however, for post-decisional motions (such as a petition for rehearing) in the court of appeals.[4] This presumably reflects the significantly different purpose and effect of post-decisional motions in trial and in appellate courts. The district court is the court of first instance, in which all parties are represented and all issues are before the court for decision, and the pendency of a post-

[4] While the Committee Note concerning the phrase quoted from Rule 4(a) indicates that this provision was intended only to make the rule comport with existing case law (see 9 Moore, *Federal Practice*, Secs. 203.25[3], p. 784, and 204.12[5], p. 965 (2d ed. 1970)), the cases cited for this proposition dealt with post-decisional motions in the district court, not the court of appeals, and did not satisfy the criteria stated in *Republic of China*.

decisional motion before it leaves the record incomplete for purposes of appellate review and could result in significant changes in the court's findings. In the court of appeals, on the other hand, only legal questions are at issue—the factual setting is fixed by the district court's findings—and the parties appealing and the issues presented frequently are limited.

Accordingly, as we argue above, we believe that a post-decisional petition for rehearing in the court of appeals does not suspend the judgment of that court, for purposes of seeking further review, with respect to parties not affected by any issue raised in the rehearing petition. Nor does it seem proper to us to treat the denial or other disposition of a petition for rehearing as renewing a judgment against non-petitioning parties which was in no way at issue in the rehearing petition. To do so would create an unwarranted extension, indefinite in duration, of the 90-day period Congress has prescribed for seeking review in this Court of appellate decisions in civil cases.[5]

It is therefore respectfully submitted that the petition for rehearing should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

JANUARY 1972.

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[5] When it deems it advisable to do so, this Court may, of course, postpone disposition of a timely petition for certiorari while petitions for rehearing by other parties are pending in the court below.

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